In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-690

ANONYMOUS, PETITIONER

v.

HENRY A. KISSINGER, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-14a) is reported at 499 F.2d 1097. The unreported opinion of the district court is reproduced as petitioner's Appendix B, pp. 1b-3b.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1974. On September 23, 1974, Mr. Justice Brennan issued an order extending the time for filing a petition for a writ of certiorari to and including December 2, 1974, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States, having reason to suspect a prospective employee's emotional fitness for a sensitive government position, may require him to aid an investigation by consenting to a psychiatric interview and by submitting to government psychiatrists relevant psychiatric records, and whether such employee may be dismissed from his temporary position for refusing to do so.

STATEMENT

Petitioner challenges his dismissal from a temporary position in the Peace Corps, formerly an agency of the Department of State.[1] Petitioner's position was designated an "Emergency Appointment to Sensitive Position Pending Completion of Full Field Investigation" (Pet. App. 3a). A full field investigation was required since the position was classified as "sensitive" pursuant to Executive Order 10450, Section 3(b), 3 C.F.R., p. 58. . A full field investigation necessarily includes an examination of information relating to "[a]ny illness, including any mental condition, of a nature which * * * may cause significant defect in the judgment or reliability of the employee" (Executive Order No. 10450, Sec. 8(a)(1)(iv), 3 C.F.R., p. 60).

Prior to his conditional appointment, petitioner executed Civil Service Standard Form 86 ("Security Investigation Data For Sensitive Position"). In response to question 19, "Have you ever had a nervous breakdown or have you ever had medical treatment for a mental condition?", petitioner responded "No" (Pet. App. 3a). In the course of the investigation, however, the agency learned that he had consulted a psychiatrist both before

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[1]After the instant action was instituted, the Peace Corps was transferred from the State Department to Action, an independent agency. Executive Order No. 11603, 3 C.F.R., p. 303.

and after executing Form 86 (Pet. App. 3a-4a). Pursuant to the government's responsibility to investigate the mental and emotional stability of prospective employees in sensitive positions, petitioner was requested to grant the government access to his medical records held by the psychiatrists he had seen. Petitioner complied with this request (Pet. App. 4a).

Subsequently, petitioner was requested to report for an interview with a consulting psychiatrist for the Peace Corps. Petitioner refused this request, and also rescinded his previous release of medical records. He offered, however, to have his own doctors submit written reports about him for the government psychiatrists to review (*ibid.*). Deeming petitioner's suggestion inadequate, the Peace Corps advised petitioner that unless he agreed to the requests for a psychiatric examination and for access to his psychiatric records, the agency would be forced to dismiss him because it would be unable to establish his suitability for employment (*ibid.*).

Petitioner elected not to cooperate and instead instituted this action, alleging that the government's requests constituted an unwarranted invasion of his privacy and seeking to enjoin the agency from dismissing him. The agency thereafter notified petitioner that he was dismissed for failing to cooperate with the agency's security investigation (Pet. App. 5a). The district court subsequently granted respondent's motion for summary judgment based on its finding that the agency had a right and duty to investigate, and that the requests made of petitioner were reasonably related to the investigation (Pet. App. 2b). The court of appeals affirmed, holding that "the agency was within its rights to inquire further with respect to [petitioner's] emotional stability as an element of his qualifications for the sensitive position" (Pet. App. 12a).

ARGUMENT

Petitioner held his position conditionally, pending a full field investigation to determine his fitness for the job.[2] As the court of appeals stated, he was dismissed from that position because he failed to cooperate in the investigation of his mental condition (Pet. App. 9a-10a). There is no doubt that the government, acting as employer, must perform its obvious duty to insure that a prospective employee is qualified to perform the job he has applied for. If the position is a "sensitive" one, such as petitioner's job with the Peace Corps, the investigation must determine whether the prospective employee has "any mental condition * * * which * * may cause significant defect in the judgment or reliability of the employee * * * ." Executive Order 10450, Section 8(a)(1)(iv), 3 C.F.R., p. 60. Petitioner does not dispute that the government's investigation of an applicant's fitness can include inquiries of a psychological nature (Pet. 9); instead, he seeks to limit the information he may be required to disclose to aid the investigation. But just as an applicant may be required to submit to a physical examination or allow inspection of medical records to determine his suitability for employment (cf. *Yates* v. *Manale*, 377 F.2d 888 (C.A. 5)), so can petitioner be required to present the information requested here. The data is needed to evaluate fairly the applicant's qualification for the job, and he cannot simultaneously apply for the position and withhold information that will determine whether he should be given the position he seeks.

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[2]The case thus differs from *Arnett* v. *Kennedy*, 416 U.S. 134, which involved the question whether a nonprobationary federal employee had a right to a trial-type hearing before being discharged (an issue that is not presented in this case).

Petitioner invokes a generalized constitutional right of privacy to support his contention that in conducting its investigation the government was required to use the least restrictive means possible (Pet. 10). Whatever the merits of that contention when the person investigated has not applied for the position, when, as here, a person affirmatively seeks government employment, he cannot do so on his own informational terms. Cf. *Pickering* v. *Board of Education,* 391 U.S. 563, 568. Petitioner exercised his privilege of refusing to cooperate, but once having done so, he had no right to require the government to employ him (Pet. App. 14a). In order to be considered, applicants have a duty to respond truthfully and fully to questions properly relating to their qualifications for a government license or position.[3] *Konigsberg* v. *State Bar,* 366 U.S. 36, 44-46; *Orloff* v. *Willoughby,* 345 U.S. 83, 90-92; *Law Students Research Council* v. *Wadmond,* 401 U.S. 154; *Blumenthal* v. *Federal Communications Commission,* 318 F. 2d 276, 279 (C.A. D.C.). The government's inquiry here was properly related. The court below so found and held therefore that petitioner's dismissal for failure to cooperate was not arbitrary or capricious (Pet. App. 13a, 14a).

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[3]It is at best doubtful whether petitioner fulfilled this duty. On his Standard Form 86 accompanying his application for employment, petitioner had answered "No" to the question whether he had "ever had medical treatment for a mental condition," although he later admitted that he had consulted "psychiatrists briefly with minor complaints related to anxiety" (Pet. App. 3a). The majority below did not decide whether petitioner's answer was false, as the district court found, although Judge MacKinnon, concurring in part and dissenting in part, believed that "[h]is answer to the question was sufficiently false to warrant further investigation" (Pet. App. 12a, 14a).

Moreover, the factual premise of petitioner's argument is not supported by the record. The interview and records requested in this case were the least restrictive means consistent with adequate inquiry into petitioner's suitability for the job. A current interview by a government psychiatrist would be perhaps the best method to determine if petitioner was mentally disqualified for the job. The request that he submit past psychiatric records was also necessary and appropriate to a proper investigation. Such records could be valuable to the government's psychiatrist in making his evaluation. Furthermore, once petitioner refused to undergo a current interview, the nature of his past experiences with psychiatrists took on greater significance. And the government was surely justified in demanding that its own psychiatrists review petitioner's records rather than relying on a summary prepared by petitioner's psychiatrist without knowledge of the full contours of the investigation or the other material developed.[4]

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[4]The majority in the court of appeals did not disagree, but stated only that (Pet. App. 13a):

> The agency would have been well advised in our opinion to have accepted one of the compromises proposed by appellant, without necessarily binding itself to its result, but our disagreement with the agency in this respect does not mount to constitutional significance.

The court noted that "plaintiff's [refusal to cooperate] may have reflected the strong legal position of his counsel," and that he thus should be given an opportunity to remove that "stigma" (Pet. App. 13a, n. 15).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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